

# PREGNANCY DISCRIMINATION IN HIGHER EDUCATION: ACCOMMODATING STUDENT PREGNANCY

EMILY MCNEE\*

## INTRODUCTION

Even forty years after the enactment of Title IX, issues involving equality for female students, particularly pregnant students, remain widespread. While students used to be excluded entirely from school programs once they became pregnant, the current forms of pregnancy discrimination are subtler.

Stephanie Stewart, a student at Borough of Manhattan Community College (BMCC), was recently told by a professor that she would not be allowed to make up tests or assignments resulting from any pregnancy-related absences, and that she would only be allowed to miss one test during the semester.<sup>1</sup> Stewart complained to administrators, but was told that professors could set their own rules about absences and make-up work.<sup>2</sup> Instead of accommodating Stewart's pregnancy and allowing her to complete make-up coursework, the professor suggested that Stewart drop the course.<sup>3</sup> Stewart was unaware of Title IX and its protections against pregnancy discrimination, and consequently dropped the course.<sup>4</sup> She returned to school after delivering her baby and was told that her only option was to withdraw from the course because of the credits she missed.<sup>5</sup> This problem is not a unique or

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\*Judicial Law Clerk to the Honorable Louise Dovre Bjorkman. J.D. 2013, University of Minnesota Law School; B.A. 2010, St. Olaf College. Thank you to Professor Jill Hasday for comments on this Article and guidance throughout the writing process. Many thanks to my mom, Cynthia, for her love and support.

<sup>1</sup> *NWLC Files Title IX Complaint Against CUNY for Discriminating Against a Pregnant Student*, NAT'L WOMEN'S LAW CTR. (Jan. 17, 2013), <http://www.nwlc.org/press-release/nwlc-files-title-ix-complaint-against-cuny-discriminating-against-pregnant-student> [hereinafter *NWLC*]; Administrative Compl. ¶ 13, *Stewart v. Borough of Manhattan Cmty. Coll.* (Jan. 17, 2013) [hereinafter *Stewart Compl.*], available at [http://www.nwlc.org/sites/default/files/pdfs/stewart\\_complaint.pdf](http://www.nwlc.org/sites/default/files/pdfs/stewart_complaint.pdf).

<sup>2</sup> *NWLC*, *supra* note 1. Ironically, the course in question was "Roles of Women." *Stewart Compl.*, *supra* note 1, at ¶ 13.

<sup>3</sup> *Stewart Compl.*, *supra* note 1, at ¶ 18-20.

<sup>4</sup> *Id.* at ¶ 21.

<sup>5</sup> *Id.* The University has since settled the case and has adopted a new policy dealing with the rights of pregnant students as a part of the settlement. Charles Huckabee, *CUNY Adopts New Policy in Settlement of Pregnant Student's Bias Claim*, CHRON. OF HIGHER EDUC. (May 2, 2013), <http://chronicle.com/blogs/ticker/cuny-adopts-new-policy-in-settlement-of-pregnant-students-bias-claim/59561>.

rare occurrence, but has become increasingly common, despite the view that discrimination on the basis of pregnancy should not be permitted.

Part I of this Article first explores the historical and legal background that led to Title IX and discusses challenges facing pregnant students.<sup>6</sup> Title IX of the Education Amendments of 1972 (Title IX) was enacted to prohibit sex discrimination in education.<sup>7</sup> The statute is probably most well-known for providing equality in athletic opportunities for women, but it also protects students from other forms of sex discrimination, such as discrimination based on pregnancy. The statute provides that pregnant students have both a right to reinstatement and a leave of absence, but does not define these terms or provide guidelines for applying them.<sup>8</sup> Next, this Part explains the modern challenges for pregnant students by looking at the ways in which pregnancy can add unique obstacles to educational attainment. Then, this Part explores the history of case law under Title IX by discussing the litigated cases involving pregnancy discrimination in education. In addition to the case law, this Part also considers the stories that the media has covered related to incidents of discrimination against pregnant students.

Part II discusses why strict and inflexible standards for pregnant students with respect to class assignments, make-up work, and attendance points violate Title IX. By making it harder for pregnant students to complete coursework in their degree programs, schools are making it unnecessarily difficult for pregnant students to continue their education. Schools should instead be incentivizing pregnant students to continue their education.

In light of this problem, Part III proposes revisions to Title IX regulations and standards that schools should implement to better serve the interests of pregnant students. Title IX should be revised to clearly address schools' obligations by defining the terms "reinstatement" and "leave of absence." Even if Title IX is not amended, schools should make an effort to engage in discussion and planning with pregnant students, in order to maintain consistent policies for make-up coursework and to ensure that pregnant students are fully reinstated after pregnancy absences. The best way for schools to comply with the statute is to incorporate pregnancy accommodations into the already-existing accommodation programs for students with disabilities.

#### I. PROBLEMS OF HISTORICAL AND MODERN DISCRIMINATION AGAINST PREGNANT STUDENTS

In order to make sense of the modern challenges for pregnant students regarding completion of coursework and continued education during pregnancy, it

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<sup>6</sup> This Article refers to pregnancy generally, although it should be noted that Title IX applies to both men and women, and covers parental, family, or marital status, in addition to pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom. *See* 34 C.F.R. § 106.40(a)-(b) (2012).

<sup>7</sup> Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 (2012).

<sup>8</sup> 34 C.F.R. § 106.40(b)(5).

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is important to understand the historical and legal background that resulted in the enactment of Title IX. The relative dearth of case law and pregnancy discrimination litigation under Title IX sheds light on the current lack of legal protections for pregnant students. More recently, there has been increased attention in the news media about specific instances of pregnancy discrimination in higher education.

*A. Historical and Legal Background of Title IX*

Until the 1960s, pregnant students were often forced to drop out of school once their pregnancy was visible.<sup>9</sup> As a result of the civil rights and women's movements, Title IX was enacted in 1972 to prohibit discrimination in education on the basis of sex.<sup>10</sup> The act is modeled after Title VII of the Civil Rights Act of 1964 (Title VII),<sup>11</sup> and has two core functions: banning sex discrimination in education and authorizing regulations to secure compliance.<sup>12</sup> Section 901(a) of Title IX provides that: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>13</sup> The statute is restricted to institutions that receive federal funds.<sup>14</sup> If an institution does not comply with the statute, the federal government can terminate the institution's federal funding,<sup>15</sup> and the statute also provides for enforcement of compliance "by any other means authorized by law."<sup>16</sup>

The Department of Education has enacted various regulations to assist with enforcement of Title IX and provides further standards specifically for pregnancy:

A recipient [school receiving federal funds] shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy

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<sup>9</sup> See, e.g., Tamara S. Ling, Comment, *Lifting Voices: Towards Equal Education for Pregnant and Parenting Students in New York City*, 29 FORDHAM URB. L.J. 2387, 2390-91 (2002) ("Until the late 1960s, more than two-thirds of the school districts throughout the country maintained formal policies expelling pregnant students from school.").

<sup>10</sup> 20 U.S.C. § 1681(a).

<sup>11</sup> See *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 891 (1st Cir. 1988) (applying the Title VII burden-shifting framework to Title IX claim).

<sup>12</sup> Compare Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012), with 20 U.S.C. § 1681.

<sup>13</sup> 20 U.S.C. § 1681(a).

<sup>14</sup> *Id.* Most schools and universities will be subject to Title IX, since the definition of "Federal financial assistance" is broad enough to include student loans. See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 65 Fed. Reg. 52858, 52866 (Aug. 30, 2000) (stating that federal financial assistance includes funds made available for "scholarships, loans, grants, wages, or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity").

<sup>15</sup> 20 U.S.C. § 1682 (2012).

<sup>16</sup> *Id.*

or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.<sup>17</sup>

The regulations also provide that pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery from pregnancy should be treated as a justification for a leave of absence for any amount of time deemed “medically necessary,” and after which time the student shall be “reinstated to the status which she held when the leave began.”<sup>18</sup>

While pregnant students are no longer forced to drop out,<sup>19</sup> they continue to face more subtle barriers to equal educational opportunities. The regulations provide that a school cannot exclude a student outright from class, but they do not specify how schools should deal with accommodating a student who is allowed to remain in class, but is subject to strict rules for completing the course successfully. The regulations provide no definition for “reinstatement,” and do not provide guidance on what the school must do to reinstate that student. In addition, the regulations provide for a leave of absence, but do not address the sort of intermittent leave that might be required for a student who wants to otherwise continue her schooling while she is pregnant. The vagueness of the regulations contributes to the problem of how to accommodate and reinstate pregnant students so that they are not denied educational opportunities. The regulations should clarify that reinstatement means accommodating make-up work, which will arise most often with intermittent absences.

#### *B. Tension Between Pregnant Student Absences and Course Expectations*

Many people are unaware that Title IX protects students in areas other than athletics, and schools across the country continue to discriminate against pregnant or parenting students. This is a significant problem, not only because of unlawful discrimination, but also because pregnancy is a significant factor contributing to dropout rates among students. According to the Centers for Disease Control and Prevention (CDC), only about fifty percent of teen mothers obtain a high school diploma by twenty-two years of age, compared with ninety percent of women who do not give birth during adolescence.<sup>20</sup> Dropout rates among college women are similarly stark: sixty-one percent of women who have children after enrolling as a student in a community college do not graduate at all.<sup>21</sup> Despite these numbers,

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<sup>17</sup> 34 C.F.R. § 106.40(b)(1) (2012).

<sup>18</sup> *Id.* § 106.40(b)(5).

<sup>19</sup> *But see* ACLU, *Hicks v. Edsitty-Beach* (Mar. 6, 2012), <http://www.aclu.org/womens-rights/hicks-v-edsitty-beach> (discussing lawsuit filed by the ACLU on behalf of student who was kicked out of middle school because she was pregnant).

<sup>20</sup> *About Teen Pregnancy*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/TeenPregnancy/AboutTeenPreg.htm> (last updated Nov. 21, 2012).

<sup>21</sup> NWLC, *supra* note 1.

studies also show that many pregnant students want to continue in school and succeed academically.<sup>22</sup>

Pregnant students are more likely to be absent from class than other students, because of their pregnancy. Aside from the birth of a child, pregnant women may need to miss class for pregnancy-related illness or doctor-ordered bed rest, for example.<sup>23</sup> When pregnant students lose points for daily assignments because of a class absence or decide not to sign up for a particular class because of strict grading policies about assignments, schools impede pregnant students' access to education. Even worse, if these schools contribute to dropout rates among high school and college women, that will leave those students at a disadvantage for future employment and other opportunities.<sup>24</sup>

On the other hand, many professors individually tailor their syllabi to the course and decide what type of coursework to use to evaluate student performance.<sup>25</sup> Many universities allow each professor to make these decisions individually, though there may be broader guidance from the university about the information the syllabus should contain.<sup>26</sup> There is also a long history of educational expectations regarding strict adherence to a class attendance policy or daily participation points.<sup>27</sup> For instance, in a study of a collection of syllabi from introductory political science courses, over half of courses consider attendance and quizzes as part of student performance, along with other active learning assessments.<sup>28</sup> While some professors are willing to excuse medical absences and

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<sup>22</sup> See *infra* Part III.B.2.

<sup>23</sup> See Deborah Brake, *Legal Challenges to the Educational Barriers Facing Pregnant and Parenting Adolescents*, 28 CLEARINGHOUSE REV. 141, 143 (1994).

<sup>24</sup> See, e.g., Daniel Klepinger et al., *How Does Adolescent Fertility Affect the Human Capital and Wages of Young Women?*, 34 J. HUM. RESOURCES 421, 423–25 (1999) (explaining that adolescent childbearing reduces the probability of completing high school and of obtaining post-secondary schooling); NWLC, *supra* note 1 (explaining that a student who had to drop a class because the professor would not allow make-up work for pregnancy resulted in lost scholarship and potential for delayed graduation and career options). *But see* Stefanie Mollborn, *Making the Best of a Bad Situation: Material Resources and Teenage Parenthood*, 69 J. MARRIAGE & FAM. 92, 93 (2007) (doubting the theory that adolescent pregnancy or parenting causes students to drop out of school and arguing that studies show that factors causing students to drop out of school are the same factors that lead them to become adolescent parents).

<sup>25</sup> NWLC, *supra* note 1.

<sup>26</sup> See, e.g., *Suggestions for Class Attendance Policies*, COLL. OF FINE ARTS, MARSHALL UNIV., available at <http://www.marshall.edu/music/files/2013/07/COFA-Attendance-Policy-Statements.pdf>.

<sup>27</sup> See *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 413–14 (1979) (stating that universities have legitimate educational reasons for expecting students to complete all course requirements: “this type of purpose, far from reflecting any [discriminatory] animus . . . is shared by many, if not most, of the institutions that train persons to render professional service”); Allie Christiansen Tucker, *Children Having Children: Why Adolescent Mothers Need Leave Too*, 36 LAW & PSYCHOL. REV. 243, 248 (2012) (collecting high school attendance policies and noting that many allow no more than ten absences per semester and mandated failure for more than ten absences).

<sup>28</sup> See Candace C. Archer & Melissa K. Miller, *Prioritizing Active Learning: An Exploration of Gateway Courses in Political Science*, 44 PS: POL. SCI. & POL. 429, 432 (Apr. 2011).

allow make-up work, other professors have a strict policy of not excusing absences.<sup>29</sup>

When a professor has a particularly strict attendance policy announced in the syllabus or evaluates students based on activities that must occur in class, students may be hesitant to ask about making up work missed due to pregnancy. Additionally, professors may be unwilling to change syllabi policies for a pregnant student if the professor is unaware of the requirements of Title IX.<sup>30</sup> The tensions between professor policies and challenges for pregnant students highlight why educational equality for pregnant students is a right that needs to be adequately protected by statute.

### *C. Pregnancy Litigation under Title IX*

There has been little litigation under Title IX concerning pregnant students generally, and very little litigation concerning class assignment opportunities. It is likely that pregnant students lack the knowledge or resources to know when their rights have been unlawfully deprived, and may lack the ability to pursue litigation with a private attorney, so few cases are actually litigated.<sup>31</sup>

To prevail at summary judgment on a Title IX claim, the plaintiff must first establish a prima facie case of discrimination.<sup>32</sup> A prima facie case involves four elements the plaintiff must show: “(1) she was a member of a protected class; (2) she was performing the academic requirements at a level well enough to meet her educator’s legitimate expectations; (3) she suffered adverse treatment; and (4) the educational program continued to instruct and credit other students.”<sup>33</sup> Then, the burden shifts to the defendant to show a legitimate nondiscriminatory reason for the adverse action.<sup>34</sup> Next, the plaintiff bears the burden of showing that the defendant’s purported legitimate reason is merely pretext for discrimination.<sup>35</sup> Thus far, no plaintiffs who have gone to court have succeeded on a claim for Title

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<sup>29</sup> See, e.g., Stewart Compl., *supra* note 1, at ¶ 12 (discussing Stewart’s efforts to inform her professors about her pregnancy and her request for make-up work, noting that four of her five professors had no problem with allowing her to do so, whereas one professor had a strict “no make-up work” policy, even for emergency medical absences); see also *infra* Part. I.C.

<sup>30</sup> See NWLC, *supra* note 1.

<sup>31</sup> See Daniel Klepinger et al., *Adolescent Fertility and the Educational Attainment of Young Women*, 27 FAM. PLAN. PERS. 23 (1995) (“Women who become parents as teenagers are at greater risk of social and economic disadvantage throughout their lives than those who delay childbearing . . .”); see also Klepinger et al., *supra* note 24, at 425–26 (suggesting that the human capital of adolescent mothers is lower than that of women who have a child after age 20). In general, students from low socioeconomic backgrounds are unlikely to enforce their legal rights. See RICHARD ARUM & DOREET PREISS, *Still Judging School Discipline*, in FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY’S ROLE IN AMERICAN EDUCATION 238 (Joshua M. Dunn & Martin R. West eds., 2009).

<sup>32</sup> *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 889 (1st Cir. 1988).

<sup>33</sup> *Hogan v. Ogden*, No. CV-06-5078-EFS, 2008 WL 2954245, at \*9 (E.D. Wash. July 30, 2008) (citing *Lipsett*, 864 F.2d at 897).

<sup>34</sup> *Lipsett*, 864 F.2d at 899.

<sup>35</sup> *Id.*

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IX discrimination arising out of grading policies. Most plaintiffs have failed to establish a prima facie case, because of failure to show they were meeting legitimate expectations of the course.

A major theme in the litigated cases involving pregnancy discrimination related to coursework is that the plaintiff cannot establish her claim because of the legitimate expectations requirement of the prima facie case. This is often the case where a student's coursework prior to or after pregnancy absences was not satisfactory. Where a student is already completing unsatisfactory coursework, the prior work can be used to show that the student was not discriminated against on the basis of her pregnancy. For example, in *McConaughy v. University of Cincinnati*, plaintiff Cynthia McConaughy was enrolled in a studio art class and because of her pregnancy was ordered to remain on bed rest.<sup>36</sup> She did not tell the school she was pregnant, and she later had a miscarriage.<sup>37</sup> McConaughy alleged that she was denied "the opportunity to stay in the program" and to receive "continued feedback on the project," a benefit other students were given.<sup>38</sup> The court held that the plaintiff failed to show she was not meeting the legitimate academic requirements of the class, since her work prior to her miscarriage received grades of D and was incomplete work product.<sup>39</sup> She was given extended deadlines for work assignments, but did not satisfactorily complete her work.<sup>40</sup>

Alternatively, even if a plaintiff establishes the prima facie case that she was meeting legitimate expectations of the course, poor quality work can still be a defense for the school by providing a nondiscriminatory reason for an adverse action. In *Ivan v. Kent State University*, plaintiff Brynda Ivan was a M.A./Ph.D. student at Kent State.<sup>41</sup> Based on evaluations from her supervisors in a clinical practicum course, she received an "In Progress" grade for the course because her grades, thesis progress, and work in the practicum showed marginal progress toward the degree and minimally adequate work.<sup>42</sup> Ivan challenged the grade, and the court held that while Ivan made out a prima facie case, the defendants articulated a legitimate nondiscriminatory reason for the "In Progress" grade; essentially, that she was not qualified to serve her practicum clients adequately.<sup>43</sup> Ivan did not provide any evidence that the grade was based on pretext,<sup>44</sup> so the

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<sup>36</sup> *McConaughy v. Univ. of Cincinnati*, 1:08-CV-320, 2010 WL 6511141 (S.D. Ohio Sept. 28, 2010), *report and recommendation adopted*, 1:08-CV-320-HJW, 2011 WL 1459292 (S.D. Ohio Apr. 15, 2011). The plaintiff was pro se in this case.

<sup>37</sup> *Id.* at \*4.

<sup>38</sup> *Id.* at \*8.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at \*12.

<sup>41</sup> *Ivan v. Kent State Univ.*, 863 F. Supp. 581, 583 (N.D. Ohio 1994).

<sup>42</sup> *Id.* at 584.

<sup>43</sup> *Id.* at 586.

<sup>44</sup> *Id.* at 586-87.

court granted summary judgment on this claim to defendants based on her lack of evidence.<sup>45</sup>

*McConaughy* and *Ivan* are not particularly troubling modern cases of pregnancy discrimination, because those cases do not involve plaintiffs who were unable to complete course requirements due to pregnancy or who were denied an accommodation for a pregnancy absence. *McConaughy* did not inform her school that she was pregnant or needed accommodations, but was essentially accommodated anyway by receiving extensions on deadlines, yet still failed to complete the work. Similarly, *Ivan* did not complete her work in the course or her degree program at expected levels. There are no facts in *McConaughy* or *Ivan* that suggesting that the plaintiffs' difficulties completing coursework was because of pregnancy. At least as the cases were litigated, they also do not show pretext for pregnancy discrimination against students. If the students were not pregnant, they would not have been able to sue for poor grades in courses.

One case does suggest that a student would have benefitted from some form of accommodation to complete the course requirements because of pregnancy-related impediments. In *Darian v. University of Massachusetts Boston*, plaintiff Rachel Darian was pregnant while enrolled as a nursing student.<sup>46</sup> One of her courses had a clinical component requiring her to work on-site at a placement for two days a week.<sup>47</sup> Her doctor ordered bed rest and she was unable to complete her clinic days.<sup>48</sup> She eventually returned to the nursing program, but had to spend much of her time observing.<sup>49</sup> Darian's professor told her that "[Nursing 401] is a clinical, not a home study course," and suggested that Darian take an incomplete in the clinical portion of the course and complete that portion after the birth of her child.<sup>50</sup> This option would mean that Darian would not graduate on time, as planned.<sup>51</sup> The court held that Darian did not establish a prima facie case because she was not meeting the legitimate expectations of the course by her inability to complete on-site clinical work.<sup>52</sup> The court explained that instructors "have legitimate educational reasons for expecting all students, male and female, to complete all course requirements, clinical and classroom."<sup>53</sup> While the professor did not overtly refuse to let Darian make up coursework or complete clinic

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<sup>45</sup> *Id.*

<sup>46</sup> *Darian v. Univ. of Mass. Bos.*, 980 F. Supp. 77, 79 (D. Mass. 1997).

<sup>47</sup> *Id.* at 80.

<sup>48</sup> *Id.* at 80–81.

<sup>49</sup> *Id.* at 81.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 81–82.

<sup>52</sup> *Darian*, 980 F. Supp. at 92. Despite the fact that Darian had a 4.65 grade point average, was a member of the Golden Key Honor Society, and received an A on her mid-term, the court held she did not meet legitimate expectations of the course. *Id.*

<sup>53</sup> *Id.*

opportunities after her pregnancy, it was clear that her pregnancy and childbirth made it more difficult for her to complete those components of the class.<sup>54</sup>

The most successful claim—and most relevant for recent reports of pregnancy discrimination in schools—is *Hogan v. Ogden*. Plaintiff Stephanie Hogan was a student at Central Washington University, enrolled in a course about video production.<sup>55</sup> According to the syllabus, students were graded based on quizzes (ten percent of the grade), individual and group assignments (fifty-five percent), equipment tests (ten percent), attendance and participation (five percent), and a final exam.<sup>56</sup> Specifically, the syllabus stated: “In addition students are expected to attend class regularly, to be well-prepared, and to complete all assignments by the designated due dates. There will be NO EXTENSIONS FOR ASSIGNMENTS AND NO INCOMPLETES GIVEN-SO DON’T ASK!”<sup>57</sup> Hogan attended every class and completed every assignment between September and October 27th.<sup>58</sup> On October 27, 2003, Hogan told her professor that she needed to miss class because she was eight months pregnant, “experiencing ‘problems’” and needed to visit her doctor.<sup>59</sup> She was told to bring a doctor’s note to excuse the absence.<sup>60</sup> After visiting her doctor, Hogan was placed on bed rest and missed an equipment test, which was the prerequisite for working on the group project that comprised fifty-five percent of a student’s grade in the course.<sup>61</sup> Hogan asked to complete the equipment test at home because other than her inability to travel, she was prepared for the test, but her professor instead recommended that she withdraw from the course because her absences burdened her group in the group project and could result in her failing the course.<sup>62</sup> Hogan even proposed several alternative solutions for taking the test, but the professor rejected them.<sup>63</sup> Unlike *Darian*, the court held that Hogan *did* meet legitimate expectations because she did not miss class until her bed rest, which was medically excused, and met the minimal showing for that element.<sup>64</sup> Hogan met her prima facie case, particularly since the professor accommodated other students for re-taking tests.<sup>65</sup> Because the defendant did not make any arguments for a legitimate nondiscriminatory reason,

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<sup>54</sup> See *id.* at 80.

<sup>55</sup> *Hogan v. Ogden*, No. CV-06-5078-EFS, 2008 WL 2954245, at \*1 (E.D. Wash. July 30, 2008).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Hogan*, 2008 WL 2954245 \*2.

<sup>62</sup> *Id.* Contrary to the professor’s comments, Plaintiff’s group members helped her stay involved despite her absences by taking notes for her, and traveling to her home to work on the group project. *Id.*

<sup>63</sup> *Id.* Plaintiff suggested having a student proctor the test for her while she was on bed rest, or taking the test eight days later when she would be released from bed rest; significantly, there was no evidence that the professor actually considered plaintiff’s proposed recommendations. *Id.* at \*6.

<sup>64</sup> *Id.*

<sup>65</sup> *Hogan*, 2008 WL 2954245 at \*6.

the court denied the defendant's claim for summary judgment.<sup>66</sup> The case later settled via a stipulated judgment.<sup>67</sup>

*D. Title IX Violations Widespread in the Media: Shift in How Title IX  
Discrimination Operates*

Issues involving pregnant students have been widespread in the media recently.<sup>68</sup> These issues often involve pregnant students who are penalized for missing class or tests due to pregnancy. Two types of situations are most common: refusing to allow make-up work for pregnancy-related reasons, and losing attendance points even when absent from class due to pregnancy. While some schools have tried to force pregnant students out of classes, this is less common.<sup>69</sup>

1. Schools Tell Students That They Will Not Be Allowed to Make Up Work For  
Pregnancy-Related Absences.

In January 2013, a professor told Stephanie Stewart that she would not be allowed to make up tests or assignments resulting from any pregnancy-related absences.<sup>70</sup> Another student, Kimberly Harris, missed a chemistry exam because she had pregnancy-related complications.<sup>71</sup> Harris, a sophomore at Utah State University had a 3.87 GPA and this exam was particularly important.<sup>72</sup> She emailed her professor, explaining why she missed the exam, and the professor referred her to a section on the syllabus, which stated that students needed to provide two weeks advance notice to reschedule an exam, or could drop an exam with no penalty if required to miss one for a medical emergency.<sup>73</sup> Harris ended up dropping the class because she worried that because she had already suffered pregnancy complications, she could end up missing a second exam.<sup>74</sup> Blogs and forums show that there are other women concerned with pregnancy and being denied the opportunity to make up classwork.<sup>75</sup>

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<sup>66</sup> *Id.* at \*7.

<sup>67</sup> *Hogan v. Ogden*, No. CV-06-5078, Stipulated Judgment (10/09/2008).

<sup>68</sup> *See, e.g., NWLC, supra* note 1.

<sup>69</sup> *See* ACLU, *supra* note 19.

<sup>70</sup> *NWLC, supra* note 1.

<sup>71</sup> Monica Bielanko, *College Student Suffering Pregnancy Complications Denied Chance to Retake Test*, BABBLE.COM (Mar. 17, 2011, 6:41 PM), <http://www.babble.com/pregnancy/college-student-suffering-pregnancy-complications-denied-chance-to-retake-test/>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *See, e.g., Title IX Pregnancy Hospitalization for Birth. Not Allowed to Make Up Work*, AVVO (2012), <http://www.avvo.com/legal-answers/title-ix-pregnancy-hospitalization-for-birth--not-1010168.html>. An anonymous poster questioned whether it was a violation of Title IX when, following four days hospitalization for giving birth, she was denied "a couple extra days to make up work" because one professor stated she would accept no late or make-up work, without exceptions. *Id.*

## 2. Students Lose Daily Attendance Points for Pregnancy-Related Absences

Other examples include a woman who was docked daily attendance points for missing class due to pregnancy and the birth of her child,<sup>76</sup> a graduate student at UVA who was told she would get an incomplete grade in the class if she missed two classes,<sup>77</sup> and a UC Davis professor who was investigated after he polled the class about how to grade a pregnant student who missed in-class quizzes.<sup>78</sup> In the UC Davis class, a student was going to miss class quizzes because of pregnancy, and the professor sent out an email to the class polling them on how to grade the pregnant student with the following options:

- a) automatic A final grade
- b) automatic B final grade
- c) automatic C final grade
- d) graded the same as everyone else: best 6 quiz scores out of a possible 7 quiz scores (each quiz only given only once in class with no repeats)
- e) just take a % of quiz scores (for example: your classmate takes 4 quizzes, averages 9/10 points = 90% = A)
- f) give that student a single final exam at the end of the quarter (however this option is only available to this one student, all others are graded on the best 6 quiz scores and the % that results).<sup>79</sup>

Arguably, if the professor graded pregnant students according to some of these poll options, it would be unequal treatment, but thus far evidence shows that this has not been true in most cases. However, this poll does indicate that schools are particularly concerned about how to grade pregnant students.

While these cases have not been litigated (or have been resolved after a complaint is filed), these news stories demonstrate that despite the dearth of case law, there are numerous situations where Title IX protections and/or awareness of those protections are vitally important. Increased professor awareness of the statute might have obviated the problem for these students, particularly if the statute contained more specific language detailing schools' obligations towards pregnant students. In turn, student awareness could help resolve problems sooner, by communicating with the school or initiating litigation.

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<sup>76</sup> Gina Crosley-Corcoran, *Did You Know Pregnant Students Have Rights? Neither Did I*, THE FEMINIST BREEDER (2013), <http://resources.thefeministbreeder.com/education/pregnancy-parenting-at-school/did-you-know-pregnant-students-have-rights-neither-did-i/>.

<sup>77</sup> Pamela Brown, *Pregnant Graduate Students Shocked by UVA Treatment*, WJLA.COM (May 25, 2011, 10:29PM), <http://www.wjla.com/articles/2011/05/pregnant-graduate-students-shocked-by-uva-s-treatment-of-them-61337.html>.

<sup>78</sup> Scott Baker, *Professor Polls Class on What To Do About Pregnant Student*, THE BLAZE (Jan. 15, 2011, 9:46 PM), <http://www.theblaze.com/stories/2011/01/15/professors-polls-class-on-what-to-do-about-pregnant-student/>.

<sup>79</sup> Scott Jaschik, *How Not to Deal With a Student Mother*, TIMES HIGHER EDUCATION (Jan. 14, 2011, 3:00 AM), <http://www.timeshighereducation.co.uk/news/inside-higher-ed-how-not-to-deal-with-a-student-mother/414879.article>.

## II. INFLEXIBLE GRADING POLICIES FOR PREGNANT STUDENTS VIOLATE TITLE IX

Grading policies without flexibility for pregnant students to make up coursework violate Title IX because they discriminate on the basis of sex. First, such policies exclude pregnant women from equal educational opportunities. Often, if a course syllabus contains explicit language about absence policies, and a student knows she is pregnant and will need to miss class, she may be deterred from taking that course or pursuing that degree program altogether. More significantly, students who try to remain in the class and are committed to pursuing those opportunities while pregnant often suffer greater harm: attempting to maintain educational status yet receiving a poor grade or losing a scholarship, because the professor does not accommodate the student's pregnancy. Second, class policies that do not allow make-up work, do not accommodate make-up work, or give less credit/points for make-up work, do not reinstate pregnant students to the same status after pregnancy or leave. These policies are not consistent with the goals of Title IX because they do not provide equal educational opportunities to pregnant women and violate the duty to reinstate students.

*A. Schools Violate Title IX By Refusing to Permit Make-Up Work From Pregnancy-Related Absences or Penalize Pregnancy Absences in Attendance-Based Grading*

Case law makes clear that full exclusion of pregnant students from school classes or activities violates Title IX.<sup>80</sup> More recent examples of discrimination do not wholly exclude pregnant students, but operate to effectively exclude pregnant students from successfully completing coursework, which has the same practical result as full exclusion. When pregnant students face harsh requirements for class attendance or must complete a late assignment for partial points, these circumstances can result in the student failing the class, dropping the class, and/or delayed graduation.<sup>81</sup> If a student needs to take a course again during a different semester, it can be an extra burden on the student's course load by adding extra credits, especially after the student has a child to care for. Thus, the harms associated with student pregnancy can be both short-term and long-term.

The modern forms of discrimination under Title IX such as those suffered by Stephanie Stewart, Kimberly Harris, and Stephanie Ogden present different factual circumstances from early reported court decisions.<sup>82</sup> The court cases often involve women who received an opportunity to remain in school and complete their coursework after pregnancy, but for whatever reasons, were unable to do so. The issue today is that there are pregnant students who are successful in class, who want to return to school after their pregnancies, but who are not allowed to make up a

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<sup>80</sup> See *Cazares v. Barber*, 959 F.2d 753 (9th Cir. 1992) (holding that it was a violation of Title IX to exclude a student from honors society solely because she was pregnant).

<sup>81</sup> See, e.g., *NWLC*, *supra* note 1.

<sup>82</sup> See *supra* Part I.

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test or assignment, or are penalized for missing class during childbirth. But for these strict course policies about make-up work or attendance points, these women would likely be able to complete the work successfully.

### 1. Inflexible Grading Policies For Make-up Work or Attendance Are Not Consistent With Purposes of Title IX

Providing equal educational opportunities is the primary legislative intent and purpose of Title IX.<sup>83</sup> The statute was considered significant for both education and future equality, and was described as:

[A]n important first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.<sup>84</sup>

The overall purpose of Title IX was thus to protect women from systemic discrimination by eradicating the discrimination in education which excluded women from equal opportunities and full citizenship in other areas, such as employment.<sup>85</sup>

Grading policies that do not permit flexibility for completion of assignments or attendance due to pregnancy reflect the type of harm that Title IX sought to prevent. Giving pregnant students a choice between dropping classes and setting aside their education while they are pregnant on one hand, or staying in class but risking a poor grade due to pregnancy-related circumstances on the other hand, does not give women an equal chance to develop their education. In either circumstance, those students do not have the opportunity to develop skills that they have chosen to pursue and which they would be able to do, but for the fact of being pregnant.

### 2. Schools Fail to Provide Full Reinstatement to Pregnant Students

Title IX regulations provide that a pregnant student must be allowed medical leave, after which she must be “reinstated to the status which she held when the leave began.”<sup>86</sup> Reinstatement is not defined in the regulations, nor is leave of

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<sup>83</sup> See 118 CONG. REC. 5808 (1972) (statement of Sen. Bayh).

<sup>84</sup> *Id.*; see also *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526–27 (1982) (“Senator Bayh’s remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute’s construction.” (internal citations omitted)).

<sup>85</sup> 118 CONG. REC. 5804 (1972) (statement of Sen. Bayh) (“The field of education is just one of many areas where differential treatment has been documented; but because education provides access to jobs and financial security, discrimination here is doubly destructive for women. Therefore, a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.”).

<sup>86</sup> 34 C.F.R. § 106.40(b)(5) (2012).

absence.<sup>87</sup> When pregnant students were entirely excluded from school or an extracurricular activity, the necessary reinstatement was less complicated. A student could be reinstated to the National Honor Society (NHS),<sup>88</sup> a student's scholarship could be re-disbursed, or a student athlete could be placed back on a sports team.<sup>89</sup> In the employment law context, a terminated employee could be reinstated to the position she held prior to pregnancy.<sup>90</sup> It is more complicated with pregnant students and coursework to figure out what "reinstatement" means, but it should mean some form of accommodation for pregnancy absences, not just re-entry into school. Otherwise, obligating schools to reinstate students after pregnancy is a hollow protection against pregnancy discrimination in education.

On one hand, reinstatement could mean that students are permitted to take a leave of absence from school and return after pregnancy. Schools may offer this option to students, but it is not clear that schools are required to do so under Title IX the same way employers must allow.<sup>91</sup> A leave of absence from school may be an acceptable option for some students, but it should not be the only form of reinstatement. In many cases, pregnant students do not want to take a lengthy leave of absence and receive an "incomplete" for a course.<sup>92</sup> This is particularly true where a student will only be pregnant for the beginning or end of a semester, and her pregnancy would not affect her ability to do the coursework for the greater part of the course. These students should not be penalized for wanting to continue their education while pregnant, particularly since one of the goals of Title IX was to keep pregnant students in school and "minimize the educational disruption" to pregnant students.<sup>93</sup>

When a student's membership to an honor society is reinstated or an employee returns to her previous job position, they regain the same opportunities and benefits associated with membership or employment. For example, on return from Family Medical Leave Act (FMLA) leave, an employee is entitled to be reinstated to the position he or she held when the leave began, or to be restored to

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<sup>87</sup> *See id.*

<sup>88</sup> *See, e.g.,* Chipman v. Grant Cnty. Sch. Dist., 30 F. Supp. 2d 975 (E.D. Ky. 1998) (granting plaintiffs' motion for preliminary injunction enjoining defendants to admit plaintiffs to National Honor Society, after female high school students were excluded from NHS after becoming pregnant).

<sup>89</sup> *See, e.g.,* Roberts v. Colo. State Univ., 814 F. Supp. 1507 (D. Colo. 1993) ("Roberts I"), *aff'd in part, rev'd in part sub. nom.* Roberts v. Colo. State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993) ("Roberts II") (affirming order for university to reinstate athletic team after university did not continue women's softball team).

<sup>90</sup> *See, e.g.,* Ulloa v. Am. Express Travel Related Servs. Co., 822 F. Supp. 1566 (S.D. Fla. 1993) (discussing employer's failure to reinstate employee after pregnancy leave of absence).

<sup>91</sup> In contrast, many workers are protected under the Family and Medical Leave Act (FMLA), which provides twelve weeks of unpaid leave or leave taken intermittently for covered employees, which includes pregnant women. Family and Medical Leave Act, 29 U.S.C. § 2612(a)-(b) (2012).

<sup>92</sup> *E.g.,* Crosley-Corcoran, *supra* note 76.

<sup>93</sup> Brittany L. Grome, Note, *The Four-Week Challenge: Student Mothers, Maternity Leaves, and Pregnancy-Based Sex Discrimination*, 4 ALB. GOV'T L. REV. 538, 554 (2011).

an equivalent position with equivalent terms and conditions of employment.<sup>94</sup> In contrast, in many of the current pregnant student scenarios being reported, it is challenging for the students to return to class with the same opportunities going forward. Instead, they are immediately at a disadvantage compared with other students who have not missed class due to pregnancy, because they are not permitted to make up exams, only receive half credit for make-up assignments,<sup>95</sup> or lose points for the time they missed.<sup>96</sup> Reinstatement to pre-pregnancy or pre-leave status needs to be less challenging and more certain for pregnant students.

### III. SOLUTIONS TO END PREGNANCY DISCRIMINATION IN EDUCATION

There are several solutions that would help remedy the problems of pregnancy discrimination in higher education. First, Title IX regulations should be clarified to provide better definitions of schools' obligations to accommodate pregnant students through reinstatement. This solution is appropriate even though the comparable Title VII does not provide for accommodations, because the language and purpose of Title IX support accommodations. Because of the differences between Title IX and Title VII, there is an opportunity in Title IX to avoid and correct the problems associated with Title VII and its lack of accommodations for pregnant women. In practical application, there are good reasons for schools to accommodate pregnant students; the potential harm to students is high, while the potential burden on schools is quite low. The best way for schools to go about implementing accommodations is to follow the Americans with Disabilities Act (ADA) interactive process model for providing reasonable accommodations.<sup>97</sup> Schools can easily adapt their models for disability accommodations to pregnancy. Schools should also provide better notice to students and professors about these policies. Increased awareness and knowledge will encourage use of the accommodations process and help avoid litigation.

#### *A. Title IX Should Be Clarified Because Current Practices Violate The Statute*

Several scholars have criticized Title IX and its accompanying regulations for lack of clarity and lack of protection for pregnant students.<sup>98</sup> The regulations need

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<sup>94</sup> 29 U.S.C. § 2614(a)(1) (2012). The FMLA does not entitle employees to accommodations that they would otherwise not be entitled to (29 U.S.C. § 2614(a)(3)(B)), but the protected 12-week or intermittent leave could obviate the need for the same types of reinstatement that pregnant students seek.

<sup>95</sup> Crosley-Corcoran, *supra* note 76 (explaining that Crosley-Corcoran received only 5 out of 25 points for daily "attendance and participation" on a day when she left early due to pregnancy-related health issues including head-cold, contractions, and bleeding).

<sup>96</sup> *See supra* Part I.D.

<sup>97</sup> *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A) (2012); 42 U.S.C. § 12182 (b)(2)(A) (2012); 29 C.F.R. § 1630.2(o)(3) (2012).

<sup>98</sup> *See* Michelle Gough, *Parenting and Pregnant Students: An Evaluation of the Implementation of the 'Other' Title IX*, 17 MICH. J. GENDER & L. 211, 212 (2011) (arguing that the Title IX regulations are inadequate because the "language and spirit of Title IX has not been given effect thus far by our schools or by some courts"); Grome, *supra* note 93, at 553–54 (arguing that schools have not adequately

to clarify the rights of pregnant students and the obligations that schools have to ensure equal educational opportunities for those students. This is necessary because even if schools were aware of this obligation, recent cases show that they are not fulfilling it.<sup>99</sup> Greater specificity will have beneficial results for both schools seeking to avoid liability and students seeking protection of their rights. Schools will better understand what their obligations are towards students and how to carry out those duties. Students will benefit from more precise language because it will clarify their rights under the statute. To that end, the regulations that accompany Title IX to assist with its enforcement should be updated.

Regulation 106.40(b)(5) should be amended to include definitional statements of “leave of absence” and “reinstatement” as follows:

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student’s physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

PROPOSED AMENDMENT:

- (i) Leave of absence includes intermittent or long-term absences.
- (ii) A student eligible for reinstatement is entitled to be reinstated to pre-leave status as soon as possible. Reinstatement includes the reasonable opportunity to complete make-up coursework, receive full credit for make-up work, credit for attendance points if absent due to a medical reason, and any reasonable accommodations necessary to facilitate completion of make-up coursework.

Clarifying the terms of Title IX obligations will help decrease discrimination by providing consistent standards for schools to follow. Clear and consistent

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responded to the needs of pregnant students); Madeline E. McNeeley, *Title IX and Equal Educational Access for Pregnant and Parenting Girls*, 22 WIS. WOMEN’S L.J. 267, 268 (2007) (“Federal regulations set forth seemingly bright-line rules extending this protection . . . Nevertheless, pregnant and parenting teens are frequently denied educational rights because some of the legal requirements are unclear and schools are often unwilling or unable to accommodate the girls.”); *see also* Kendra Fershee, *Hollow Promises for Pregnant Students: How the Regulations Governing Title IX Fail to Prevent Pregnancy Discrimination in School*, 43 IND. L. REV. 79, 92–95 (2009) (arguing that Title IX and its regulations are insufficient mechanisms for preventing pregnancy discrimination in schools because of their vague and imprecise language).

<sup>99</sup> *See* Gough, *supra* note 98, at 216-17 (explaining that legal scholarship “shows general agreement that Title IX has not been given its full range by schools and some courts” because “schools continue to practice informal push-out policies, operate less-than-comparable alternative schools, treat pregnant and parenting students with hostility, fail to accommodate pregnant and parenting students’ health and emotional issues, prohibit or discourage pregnant and parenting students from participating in certain classes, and in general, continue to treat pregnant and parenting students differently than students with other health challenges and conditions”).

standards that support the language and purpose of Title IX are necessary in order to best protect pregnant students in the manner that Title IX intended.

*B. Title IX Should Allow Accommodations For Pregnant Students Despite Opposition To Pregnancy Accommodations In Title VII*

Critics may argue that it is unfair for pregnant students to get opportunities to make up coursework or receive credited attendance points when other students do not get an extension to make up work or receive attendance points for class absences.<sup>100</sup> This type of opinion is typical of the debate over “equal treatment” versus “special treatment” for pregnancy.<sup>101</sup> Equal treatment thinkers advocate that women and men should be treated the same, thus pregnancy does not result in a need for accommodations for women.<sup>102</sup> In contrast, advocates for special treatment argue that affirmative steps are needed in order to truly provide equal opportunities for women.<sup>103</sup> Telling pregnant students that they will be penalized for missing class due to pregnancy or denying permission to make up a missed test is not what Title IX intended to protect and does not result in sex equality, especially since pregnant students were historically excluded from attending school once they became pregnant.<sup>104</sup> These attitudes about pregnant students are exactly what Title IX sought to repudiate by guaranteeing access to school and education for pregnant students that choose to pursue that path. Moreover, there are strong reasons in favor of providing accommodations to students for pregnancy. The particular harm to students who do not receive an accommodation is high in the educational setting, yet the accommodations typically sought are often low cost and place a low burden on schools.

1. Title IX Should Be Read More Expansively Than Title VII Regarding Accommodations

Title VII, the employment law counterpart to Title IX, requires that pregnant employees be “treated the same” as “other persons not so affected but similar in

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<sup>100</sup> See Crosley-Corcoran, *supra* note 76 (noting that Crosley-Corcoran asked her advisor what to do about coursework, specifically daily attendance points she would miss for childbirth, and his response of “[w]ell, [the professor] can set any attendance policy she wants, and it’s not fair to everyone else if you get points when you’re not there”).

<sup>101</sup> See Susan A. Kidwell, Note, *Pregnancy Discrimination in Educational Institutions: A Proposal to Amend the Family Medical Leave Act of 1993*, 79 TEX. L. REV. 1287, 1311–14 (2001) (discussing the equal versus special treatment debate related to pregnant employees in educational institutions).

<sup>102</sup> See Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 380 (1984-1985).

<sup>103</sup> D’Andra Millsap, *Reasonable Accommodation of Pregnancy in the Workplace: A Proposal to Amend The Pregnancy Discrimination Act*, 32 HOUS. L. REV. 1411, 1426 (1996) (explaining that special treatment thinkers argue that equal treatment of men and women “results in inequality for women in circumstances where women’s needs differ from the needs of men”).

<sup>104</sup> See Ling, *supra* note 9, at 2390–91; see also Kidwell, *supra* note 101, at 1314 (noting that pregnancy discrimination case law indicates that “special accommodations may be necessary to achieve legislatively mandated equality”).

their ability or inability to work.”<sup>105</sup> Significantly, Title IX contains no such limiting language. Instead, Title IX merely states that schools shall not discriminate on the basis of pregnancy; there is no language about treating pregnant students the same as other non-pregnant students. Although the two statutes prohibit similar forms of discrimination, the terms are not identical and thus can be analyzed differently when it comes to protections afforded pregnant women. Title IX is already more expansive than Title VII in several respects.<sup>106</sup> For instance, Title IX has no justification-based exceptions to sex-based discrimination, such as a bona fide occupational qualification (BFOQ) or business necessity.<sup>107</sup> In addition, the sex harassment provisions in Title IX do not require the actual knowledge that Title VII calls for.<sup>108</sup> Courts have also suggested that Title IX has broader purposes than Title VII: “whereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on ‘protecting’ individuals from discriminatory practices carried out by recipients of federal funds.”<sup>109</sup>

Significantly, Title VII does not prohibit employers from providing accommodations to all employees, and does not prohibit states from creating more favorable laws. Rather, the Pregnancy Discrimination Act (PDA) creates a “floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.”<sup>110</sup> Thus, the PDA leaves open the possibility that states could enact laws that treat pregnancy more favorably than other disabilities, or that employers could do so.<sup>111</sup>

The PDA was not enacted as part of Title VII, but came later, once pregnancy discrimination was recognized as a problem. The history of Title IX now offers a similar opportunity to provide even better legal rights to pregnant students. Because Title IX is silent about pregnancy accommodations and how pregnant students should be treated compared with other students, there is an opportunity to read Title IX differently than Title VII by providing greater protections to pregnant women. Moreover, there is already support for a bill that would increase

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<sup>105</sup> 42 U.S.C. § 2000e(k) (2012) (defining “because of sex” and “on the basis of sex”).

<sup>106</sup> David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 264 (2005) (discussing differences between Title VII and Equal Protection Clause compared with Title IX and arguing that Title IX is more inclusive of a substantive theory of equality). For further discussion on the differences between Title VII and Title IX, see Brian A. Snow et al., *The Problem of Determining Title IX Liability*, 154 ED. LAW REP. 1, 10 (2001) (“In sum, Title VII and Title IX are fundamentally different statutes and, as a result, it is inappropriate to attempt to graft Title VII statutes onto Title IX claims or vice versa.”).

<sup>107</sup> See 42 U.S.C. § 2000e-2(e) (2012).

<sup>108</sup> See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 674–75 (1999) (explaining that the standards for Title VII hostile work environment do not apply to schools, because the norms of the adult workplace do not translate easily to schools); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286–87 (1998) (holding that Title IX’s framework for harassment cases is different from that of Title VII).

<sup>109</sup> *Gebser*, 524 U.S. at 289.

<sup>110</sup> *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 285 (1987).

<sup>111</sup> *Id.*

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protections for pregnant women in the workplace by requiring reasonable accommodations for pregnancy in employment.<sup>112</sup>

Reading Title IX as more inclusive of equality through accommodations is appropriate considering normative assumptions. The view that sex equality consists of treating men and women equally without regard to women's differences<sup>113</sup> fails to appreciate the normative assumptions that structure workplaces, schools, and discrimination laws.<sup>114</sup> The requirement that pregnant students are treated the same as all other students ignores the fact that most schools and workplaces are structured around male norms.<sup>115</sup> More comprehensive definitions of both discrimination and equality are needed in order to address policies that perpetuate sex inequality.<sup>116</sup> Several scholars support a broader view of equality that would not require treating every person the same: "rejecting the notion that Title IX only requires schools to treat similarly situated male and female [students] the same . . . [is] a 'powerful indictment of a formal equality perspective that accepts the existence of sex difference as a basis for limiting the reach of equality law.'"<sup>117</sup> Taking a broad view of discrimination is appropriate when subtle discrimination rather than overt exclusion is at stake.

When it enacted Title IX, Congress was concerned with ending the "persistent, pernicious discrimination which [was] serving to perpetuate second-class citizenship for American women."<sup>118</sup> Statements in the Congressional record show that Congress wanted to provide equal opportunity in education as a way to provide greater access to jobs, employment security, financial security, and ending the far-reaching effects of educational discrimination for women.<sup>119</sup> Reading the language of Title IX to require accommodations for pregnant students helps

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<sup>112</sup> Pregnant Workers Fairness Act, H.R. 5647, S.3565, 112th Cong. § 2 (2012). The bills were not enacted, but were referred to committee. *Id.*

<sup>113</sup> See, e.g., CATHARINE A. MACKINNON, *SEX EQUALITY* 4–5 (2001) ("If one is the same, one is to be treated the same; if one is different, one is to be treated differently.").

<sup>114</sup> See Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 *STETSON L. REV.* 1, 23 (1995) (discussing the differences in equal treatment and special treatment as they relate to sex equality).

<sup>115</sup> See Millsap, *supra* note 103, at 1426 (arguing that the PDA should be amended because the equal treatment focus of Title VII requires women to conform to maleness, and "allows equality only for women who are willing and able to conform to that norm," which is impossible with pregnancy because it is the "one area where women cannot be like men."); see generally Williams, *supra* note 102 (discussing gender equality and pregnancy in the context of the equal treatment debate); see also Laura Wood, *Where are the Pregnancies on Campus?*, *THE THINKING HOUSEWIFE*, (Jan. 13, 2011, 10:56 AM), <http://www.thinkinghousewife.com/wp/2011/01/where-are-the-pregnancies-on-campus/> ("The sexual revolution did not free people from inhibitions and guilt. If it had, there would be pregnant women everywhere.").

<sup>116</sup> See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *STAN. L. REV.* 1111, 1136–37 (1997).

<sup>117</sup> Cohen, *supra* note 106, at 264 (discussing substantive equality and reach of Title IX, specifically in athletics) (quoting Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 *U. MICH. J.L. REFORM* 13, 56 (2001)).

<sup>118</sup> 118 *CONG. REC.* 5804 (1972) (statement of Sen. Bayh).

<sup>119</sup> *Id.*

achieve these goals and expands protections against sex discrimination to address modern inequality.

## 2. Strong Reasons Favor Accommodation

There are significant benefits that result from providing accommodations to pregnant students. The particular harm to students denied accommodations in the educational setting is high, while the burden on schools to provide those accommodations is low. Students who cannot effectively return to a course after pregnancy are at risk for not continuing their education. This may serve as a more long-term disadvantage, since a person with a college degree may earn up to double the weekly earnings of a person with only a high school diploma.<sup>120</sup> Helping students return to school after giving birth by providing for grading accommodations may encourage students by sending the message that receiving an education is important. Schools can likely implement these policies and accommodations at low cost but high benefit.

At the higher education level, there are both planned and unplanned pregnancies. Generally, students who go on to receive a college education may be less likely to become pregnant;<sup>121</sup> however, studies have shown that in the 1980's, abortion ratios increased as educational attainment increased for women ages eighteen to twenty-four.<sup>122</sup> On the other hand, there are women who choose to become pregnant during their education, particularly in programs with longer tracks to completion, such as medical school.<sup>123</sup> Although some women who give birth during their adolescence or in college may be more likely to drop out of school,<sup>124</sup> whether pregnancy is planned or unplanned, many women express a desire to continue their education during pregnancy. Some women were achieving academic

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<sup>120</sup> See *Earnings and Unemployment Rates by Educational Attainment*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, (last modified Jan. 28, 2013), [http://www.bls.gov/emp/ep\\_chart\\_001.htm](http://www.bls.gov/emp/ep_chart_001.htm) (comparing \$652 weekly salary of someone with high school diploma to \$1066 salary of someone with bachelor's degree).

<sup>121</sup> Wendi A. Story, *The Effects of Unplanned Pregnancy Among College Women* 18 (Apr. 13, 1999) (unpublished master's thesis, Virginia Polytechnic Institute and State University) (*available at* <http://scholar.lib.vt.edu/theses/available/etd-042399-152334/unrestricted/storybody.pdf>).

<sup>122</sup> See, e.g., Kenneth D. Kochanek, *Induced Terminations of Pregnancy: Reporting States, 1985 and 1986*, 37 MONTHLY VITAL STATISTICS REP., Apr. 1989, at 4.

<sup>123</sup> KJ Dell'Antonia, *Pregnant Without a Policy in Graduate School*, N.Y. TIMES (Mar. 4, 2013, 11:11AM), <http://parenting.blogs.nytimes.com/2013/03/04/pregnant-without-a-policy-in-graduate-school/> (discussing reasons why graduate students might choose to have a child while in school and the lack of accommodations in grad school); Jessica Grose, *The Case for Having Kids in Your 20s*, SLATE (Mar. 05, 2013, 12:07 PM), [http://www.slate.com/blogs/xx\\_factor/2013/03/05/anna\\_jesus\\_and\\_grad\\_school\\_pregnancy\\_is\\_it\\_crazy\\_to\\_have\\_kids\\_in\\_you\\_r\\_20s.html](http://www.slate.com/blogs/xx_factor/2013/03/05/anna_jesus_and_grad_school_pregnancy_is_it_crazy_to_have_kids_in_you_r_20s.html); Anna Jesus, *Pregnant in Medical School*, N.Y. TIMES (Mar. 2, 2013), <http://www.nytimes.com/2013/03/03/opinion/sunday/pregnant-in-medical-school.html> (discussing author's experiences as a pregnant medical school student).

<sup>124</sup> See *NWLC*, *supra* note 1, and accompanying text.

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success before pregnancy, and would likely meet the legitimate expectations prong of the prima facie case.<sup>125</sup>

One recent study interviewed ten traditional-aged college women who experienced an unplanned pregnancy while enrolled as a full-time student in a university.<sup>126</sup> Some women found it hard to concentrate on their responsibilities as a student during their pregnancy and saw their grades suffer, but others became more driven and focused on completing their education after pregnancy.<sup>127</sup> One participant stated:

I just got more serious about school work [sic] and about what direction I want to take once I graduate. I know what I want to do. I have it . . . all mapped out whereas at first it was like yeah, I'm going to graduate, move, and get a job.<sup>128</sup>

Pregnant high school students have also reported a desire to continue with school or go back to school if they dropped out:

I'm not even sure I would've wanted to go to college if I wouldn't have been pregnant . . . Without education, you can't go nowhere in life. And if you don't go nowhere in life, you can't raise a child. I'm raising a child by myself, so I have to have an education.<sup>129</sup>

. . .

[I] need to finish high school, and I wanna [sic] go to college so I can have a better career.<sup>130</sup>

Pregnant or parenting students note that schools often have misperceptions about students because of their status: “[w]e [pregnant students or students with children] have different lives than other students. We have different responsibilities. But it wasn't like we couldn't learn, though. They sometimes thought that we couldn't learn.”<sup>131</sup> For the students quoted, pregnancy, whether planned or not, serves as motivation to continue their education and think seriously about the future. Accommodations in grading policies are thus particularly important for this group of pregnant students.

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<sup>125</sup> See *supra* Part I (Stewart, Harris, and particularly Darian, who had a 4.65 grade point average).

<sup>126</sup> See generally Story, *supra* note 121.

<sup>127</sup> *Id.* at 60; Kelli Kennedy, *Study: Pregnant Teens Need Better School Support*, SALT LAKE TRIBUNE (Nov. 22, 2012 8:37 PM), <http://www.sltrib.com/sltrib/world/55332077-68/pregnant-students-gonzalez-program.html.csp> (discussing high school student who became pregnant and felt motivated to do better in school after she became pregnant: “I did push myself a lot harder and I made sure that I wasn't going to be that statistic” (quoting Kali Gonzalez)).

<sup>128</sup> Story, *supra* note 121, at 60.

<sup>129</sup> Lee SmithBattle, “*I Wanna Have a Good Future*”: *Teen Mothers' Rise in Educational Aspirations, Competing Demands, and Limited School Support*, 38 YOUTH SOC'Y 348 (2007) (quoting teen mother Tashika).

<sup>130</sup> *Id.* at 356 (quoting teen mother Kate).

<sup>131</sup> Heidi L. Hallman, *Reassigning the Identity of the Pregnant and Parenting Student*, 36 AM. SECONDARY EDUC. 80, 80 (2007) (discussing the stereotyped versions of teen mothers, and quoting Krystal, a student at a school for pregnant and parenting teens).

There is a low burden on schools to accommodate pregnant students using the disability accommodations model. The types of accommodations sought by pregnant students are likely low-cost, schools would not need to accommodate unreasonable requests, and schools can place limits on the types of accommodations that will be offered. Failing to accommodate students under Title IX can also have significant consequences for schools, since they can lose their federal funding.<sup>132</sup>

The accommodations that students seek related to grading policies are often low-cost and easily facilitated by schools. Based on employers' experiences in accommodating people with disabilities, studies show that employers suffer no new cost or a one-time cost of \$500 or less when making accommodations.<sup>133</sup> Because most of the accommodations for pregnant students involve grading policies or make-up opportunities, the only cost involved is the professor's time writing a make-up exam or the school's time arranging for a proctor. The only economic cost would be salary costs if paid proctors are used, or if professors will receive compensation for the additional time and work. Any use of facilities or lab equipment would be the same as if the student had taken an exam as initially planned. Moreover, some professors already provide flexible grading accommodations, without problems.<sup>134</sup> Schools are required to have an accommodation process for disabled students according to the ADA,<sup>135</sup> and some schools provide accommodations to students regardless of disability. For example, Kimberly Harris' professor allowed make-up exams with advanced notice, and the school and professor had a process for administering make-up exams. As discussed *infra*, if providing an accommodation would be burdensome for the school or particular professor, there are options available. Schools do not need to accommodate unreasonable requests by students, and can offer alternative accommodations where a student's requested accommodation would be too burdensome.

For a student who misses an exam or in-class quiz due to a pregnancy-related medical absence, the school can schedule a different time for the student to take the exam. Instead of a policy that limits the grade on make-up work to less than 100% of the available points, schools should have an exception for students who complete

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<sup>132</sup> 20 U.S.C. § 1682 (2012). Many schools rely heavily on federal funding, which is why this penalty provides an incentive for schools to comply with Title IX. JOHN WILSON, PLAYING BY THE RULES: SPORT, SOCIETY, AND THE STATE 44 (1984).

<sup>133</sup> Beth Loy, Ph.D., *Job Accommodation Network, Workplace Accommodations: Low Cost, High Impact* 3 (last updated Sept. 1, 2013), <http://askjan.org/media/downloads/LowCostHighImpact.pdf>.

<sup>134</sup> See Stewart Compl., *supra* note 1, at ¶ 12.

<sup>135</sup> See 42 U.S.C. § 12182(b)(2)(A)(ii) (2012) (stating that a public accommodation entity discriminates under the ADA when it fails to make reasonable accommodations for individuals with disabilities unless the entity can demonstrate that the accommodation would fundamentally offer the service being offered or result in an undue burden); see also 42 U.S.C. § 12181(7)(j) (2012) (defining public accommodation to include elementary, secondary, undergraduate, and private postgraduate schools or other places of education).

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make-up work due to pregnancy (and probably for students with disabilities). Students who miss exams or turn in assignments late because of a medical reason should not be penalized the same way a student would be for merely turning in a late assignment.

*C. Best Practices for Schools*

Schools can ensure that they do not discriminate on the basis of pregnancy by engaging in discussions with pregnant students about accommodating make-up coursework in order to reinstate these students to an equivalent position after pregnancy. The most effective way schools can avoid liability is by engaging in a process similar to the interactive process required of employers and employees under the ADA.<sup>136</sup>

Because reinstatement is provided under Title IX only if leave is considered “medically necessary,” ongoing communication between the school and the student is critically important. Students should provide documentation throughout pregnancy for various absences, and schools should determine how to coordinate reinstatement for that student after pregnancy.

Of course, if schools do want to have strict course grading policies with no exceptions, and avoid Title IX liability, they also have the option of not receiving federal funding.<sup>137</sup>

1. Apply ADA Accommodations Model to Title IX Pregnancy Accommodations

Schools should apply the ADA accommodations model to Title IX accommodations for pregnancy and should engage in the interactive process to determine what accommodations are necessary to properly reinstate pregnant students. The interactive process under the ADA involves collaboration between employers and employees: an employee with a disability requests an accommodation from the employer, and the employer should make an effort to determine what the appropriate accommodation is by engaging in an interactive process that involves both parties.<sup>138</sup> The process involves meeting with the person who requests an accommodation, getting input from the person about the type of accommodation they think is reasonable, and offering or discussing alternatives when the accommodation sought is too burdensome.<sup>139</sup> In schools, the process would be triggered when the student initiates a request for an

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<sup>136</sup> 29 C.F.R. § 1630.2(o)(3) (2012); *see, e.g.*, *Fjellestad v. Pizza Hut of Am, Inc.*, 188 F.3d 944, 951 (8th Cir. 1999).

<sup>137</sup> 117 CONG. REC. 39, 252 (Nov. 4, 1971) (statement of Rep. Mink) (“Any college or university that has a policy which discriminates against women . . . is free to do so under Title IX, but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for this support of institutions to which we are denied equal access.”).

<sup>138</sup> *See, e.g.*, *Fjellestad*, 188 F.3d at 951.

<sup>139</sup> *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 135 (2d Cir. 2008).

accommodation.<sup>140</sup> Accommodations under the interactive process are highly fact-intensive and determined on a case-by-case analysis.<sup>141</sup>

Schools may object to the obligation to provide accommodations for pregnant students due to concerns that accommodations will be costly, infeasible, or burdensome. Following the ADA model of the interactive process means that schools do not need to provide every accommodation requested. Schools can deny a particular accommodation where a less costly alternative is available, or can refuse to provide an accommodation that would be unduly burdensome or would fundamentally alter the nature of the course.<sup>142</sup> A school need only provide accommodations that are reasonable. Following the ADA model, a school would not be obligated to provide an accommodation if the school could demonstrate that the accommodation would “impose an undue hardship on the operation of the [school].”<sup>143</sup> If an accommodation would be too costly or would require a professor to set up an independent study in order for a student to complete the required make-up work, it would likely interfere with the school’s operations. For instance, if a student missed every in-class quiz, every paper, or every exam in a course, the school would not be obligated to offer the course on an individualized basis to that student. Instead, the accommodation could be that the student withdraw from the course without financial or grading penalty, and be able to complete the course during another semester.

The school can provide an alternative accommodation and is not obligated to provide the student’s preferred accommodation.<sup>144</sup> For example, it may be sufficient that Harris’ professor allowed students to miss an exam without penalty rather than retake it.<sup>145</sup> If a school decides that a student has been absent from class to such an extent that reinstatement would be a burden for the professor and the school, the student could instead withdraw from the course without academic or financial penalty, and be permitted to retake the course when it is next offered. In this way, schools would not be providing students with de facto credit for an entire course missed due to pregnancy. Implementing this process for accommodations

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<sup>140</sup> E.E.O.C. v. Convergys Customer Mgmt. Grp., Inc., 491 F.3d 790, 794 (8th Cir. 2007); EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, No. 915.002, 2002 WL 31995335, at \*7 (Oct. 17, 2002), <http://www.eeoc.gov/policy/docs/accommodation.html>.

<sup>141</sup> Cheryl L. Anderson, “Neutral” Employer Policies and the ADA: The Implications of *US Airways, Inc. v. Barnett Beyond Seniority Systems*, 51 DRAKE L. REV. 1, 5 (2002) (describing the accommodation process under the ADA).

<sup>142</sup> See 29 C.F.R. § 1630.2(p) (2012) (listing factors to be considered as to undue hardship such as the cost of the accommodation, impact on operation of the facility and its business); see also 42 U.S.C. § 12182(b)(2)(A)(ii) (2012) (discussing when a public accommodation is not required to make reasonable modifications in its policies under the ADA).

<sup>143</sup> 42 U.S.C. § 12112(b)(5)(A) (2012); 29 C.F.R. § 1630.2(o)(3) (2012).

<sup>144</sup> *Eckles v. Consol. Rail Corp.*, 890 F. Supp. 1391, 1399 (S.D. Ind. 1995) (“The ADA does not require that an employer provide the best accommodation possible to a disabled employee. Nor is an employer required to accommodate a disabled employee in exactly the way he or she requests.”).

<sup>145</sup> Bielanko, *supra* note 71.

would be fairly easy for schools, since they can simply expand their existing disability accommodations process to include pregnancy.

## 2. Provide Notice to Students and Professors About Title IX

Providing accommodations for pregnant students is only helpful if students are aware that such accommodations exist. Schools should make it clear to both students and professors that accommodations are required under Title IX to reinstate students who have missed class due to medically necessary absences. Notice to professors is particularly important, since many schools may allow professors to create their own policies regarding make-up work.<sup>146</sup>

Schools should include information about Title IX obligations in student handbooks and on the policy section of their websites. In a search of various school policies, some high schools currently provide policies on accommodations provided to pregnant students, while most universities have some form of semester-long academic leave for students, but no provisions for make-up work for intermittent absences.<sup>147</sup> Notice to students is important so they can plan ahead and fulfill their communication obligations under the interactive process to facilitate finding an accommodation.<sup>148</sup>

The lack of pregnancy discrimination cases under Title IX suggests that either pregnancy discrimination does not occur in schools—which is unlikely—or that litigation is not a good solution, for whatever reason including: lack of awareness, financial resources, or the short-term nature of the problem. In any event, students will benefit from non-litigation solutions by avoiding the costs of litigation and reaching a more timely resolution.

## CONCLUSION

Despite the enactment of Title IX in 1972, there are continued problems for pregnant students in the educational system. Where pregnant students used to be systematically excluded from schools because of pregnancies, they are now subject to more nuanced forms of discrimination by individual course policies. This takes

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<sup>146</sup> NWLC, *supra* note 1; *see also* Gough, *supra* note 98, at 256–57 (explaining that school administrators are often unaware of their legal obligations under Title IX).

<sup>147</sup> *Compare* Durham Public Schools, 3250 - *Pregnant and Parenting Students*, <http://www.dpsnc.net/about-dps/district-policies/523/3250-pregnant-and-parenting-students> (providing that “[h]omework, make-up work, and homebound instruction if necessary, shall be made available to pregnant and parenting students to enable them to keep current with assignments and avoid losing course credit because of their absence from school”), *with* University of Wisconsin-Superior, *Academic Policies and Procedures*, [http://www.uwsuper.edu/catalog/2010-12/policies/academic-policies-procedures.cfm#\\_23\\_1116706](http://www.uwsuper.edu/catalog/2010-12/policies/academic-policies-procedures.cfm#_23_1116706) (providing that pregnant students are “entitled to any necessary physical, curricular, or test accommodations needed due to the pregnancy and or childbirth”), *and* Stanford University, *Childbirth Accommodation Policy for Women Graduate Students at Stanford University*, [http://www.stanford.edu/dept/DoR/GSH/childbirth\\_policy.pdf](http://www.stanford.edu/dept/DoR/GSH/childbirth_policy.pdf) (providing leave of absence for pregnant students for one or two quarters).

<sup>148</sup> Gough, *supra* note 98, at 256 (stating that pregnant students’ ability to gain protection under Title IX depends on students’ “knowledge of their rights and their willingness to assert them”).

the form of students who receive partial credit for make-up assignments or exams, who are not allowed to make up work, or who suffer grade penalties for absences that are medically necessary. These policies discriminate against women in violation of Title IX and need to be addressed. This Article proposes that because such policies are unlawful, Title IX should be amended to ensure schools are aware that they are obligated to accommodate pregnancy when reinstating students, even after intermittent absences. Regardless of an amendment to the regulations, schools should take seriously their duties under the statute and should include pregnancy accommodations within their existing framework for disability accommodations.